

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

77-1209

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

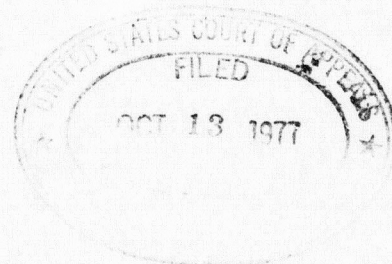
Docket No.
77-1209

THOMAS BANKS,

Defendant-Appellant.
-----x

ON APPEAL FROM THE JUDGEMENT OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF
NEW YORK

and appendix
BRIEF FOR THE APPELLANT



PAGINATION AS IN ORIGINAL COPY

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10. Letter from Mr. Korn, dated February 7, 1977.

STATEMENT OF CASE

On February 11, 1977 following a jury trial in the United States District Court for the Southern District of New York, Hon. Richard Owens, D.J. presiding, appellant Thomas Banks was convicted on three counts of mail fraud in violation of 18 USC 311, 1708 and 1709. On March 24, 1977 appellant was sentenced to two years imprisonment, on each of two counts which are to run concurrently. The execution of sentence on the third count was suspended and the appellant was placed on probation for five years following completion of the concurrent two-year sentences. Notice of Appeal was filed on April 4, 1977. Jurisdiction is conferred on this Court by 28 USC 129.

The Appellant requests that the Appeals Court set aside the decision of the lower court and grant a new trial. The circumstances prior to and during trial which support the granting of a new trial may be summarized as follows:

The original indictment (A-3) filed August 10, 1976 was superceded by a second indictment (A-4) filed February 3, 1977 three days prior to trial. The first indictment alleged that the defendant conspired with one other man to defraud the United States on or about December, 1973. The second indictment alleged the conspiracy and also listed four overt acts occurring between December, 1973 and April, 1975. A third indictment (A-50) filed during the trial alleged the conspiracy and listed five overt acts occurring between April, 1973 and March, 1976. The second and third indictments entirely changed the scope of the prosecution's case. However, no time was permitted by the Trial Court to reprepare the defense. Therefore the defendant is requesting that he be granted a new trial, so that he may adequately defend himself.

STATEMENT OF THE FACTS

On August 10, 1975 the defendant Thomas Banks was indicted for mail fraud. The indictment alleges, "From in or about December, 1973 Thomas Banks conspired with William Jones (a co-conspirator but not a defendant) to steal certain articles of mail in violation of Title 18, USC, Sec. 1708 and 1709. Only one overt act, that of the conspiracy was alleged.

Thomas Banks was a Postal Service employee who had been employed by the Service for seven years. Mr. Banks is married and the father of three children. At the time of the initial indictment the attorney for the government was Mr. Angus Macbeth who has since been replaced by Mr. Henry Korn and Mrs. Shirah Neiman. Counsel for the defense asked Mr. Macbeth for discovery in the fall of 1976 (TR-23). In a letter dated November 30, 1976 (TR-24) Mr. Macbeth offered the defense the postal service report and Mr. Macbeth also stated that "The postal inspectors are preparing copies of all the checks that may be involved in this case. I will forward them to you as soon as they are in my possession." (TR-24)

Counsel for the defense telephoned Mr. Macbeth numerous times to see if Mr. Macbeth had obtained any further information. (TR-25) No new information was ever offered or delivered and Mr. Macbeth stated he had given defense counsel all information he had. (TR-23) Such information included the name of the government's key witness, Mr. William Jones, the co-conspirator named in the indictment. (TR-14-15) However, Mr. Macbeth was soon replaced by Mr. Korn and Ms. Neiman.

The trial date was originally scheduled for January 11, 1977 but was postponed by motion of the prosecution until January 20, 1977. On January 20, 1977 the U.S. Attorney, Mr. Korn, requested another postponement because Mr. Jones, "an essential

witness" in the prosecution's case, could not be found. At that time Mr. Korn also filed an affidavit for suspension of speedy trial rules (TR-20, A-7). This affidavit was designed to secure further postponements of the trial if necessary, in the event that Mr. Jones remained out of the prosecution's reach. However on January 31, 1977, Mr. Korn sent a letter (A-9) to the Court and to defense counsel, stating that the government would proceed to trial without Mr. Jones. Nothing was stated in that letter about superseding the original indictment.

On February 3, 1977, Mr. Korn telephoned defense counsel and read the second indictment to him over the telephone. (A-4) Defense counsel informed Mr. Korn that he was going to ask the Court for an adjournment because of the changes in the indictment. Mr. Korn stated that he would oppose such a motion. (TR-7) The Court had instructed Mr. Korn that any applications for adjournments were to be made by Friday, February 4, 1977. (TR-3) Although Mr. Korn spoke to defense counsel on Friday, February 4, 1977 (TR-19-20) he did not tell the defense about the Court's time limit for the filing of a postponement. Mr. Korn did arrange with defense counsel to convey 3500 material on Sunday, February 6, 1977 in the courthouse. (TR-20) Defense counsel and Mr. Korn were both in the building on that date, but through mutual misunderstanding did not meet and no material was conveyed (TR-5-6).

On Monday, February 7, 1977, defense counsel came before the Court and requested an adjournment. The Court was extremely disturbed by the application. Initially the Court was distressed because it believed that any application for adjournment should have been made the week before. (TR-4) The Court did not realize that defense counsel had not been so informed. (TR-19) The Court also expressed concern over the apparent readiness of all parties except for the defense. The Court stated "we have forty jurors on hold, we have all the lawyers here, we have the Court's time set aside. On Friday I can put another case in. It is poor tactics on your part to walk in when I have forty jurors, the

Assistant is here, he has witnesses ready, I am ready, the whole park is vacant, and you come in at 10:20 and say I want an adjournment." (TR-8). The Court also believed that defense counsel had precipitously departed from a meeting with the government attorney the day before. (TR-4).

In response to the above protestations of the Court counsel for the defense stated that he was never informed about the time limitations placed on the application for an adjournment. (TR-4). Through various discussions it was ascertained that the defense should have been informed of the time restrictions either by the Court's clerk, or by the prosecutor, Mr. Korn. However, the Court's clerk specifically asked Mr. Korn to convey the message (TR-19) and although Mr. Korn spoke to defense counsel on Friday, February 4, 1977 the message was not conveyed. The defense had also stated it would be unfair and prejudicial to go to trial at this time. The defense brought up the fact that the new indictment charged the defendant with cashing four checks , and in the original indictment he was charged only with conspiracy. (TR-2-3) Counsel also stated with specificity how he would use the adjournment time by stating which matters the defense needed to investigate. (TR-15-16)

The Court recessed to consider the matter in issue and to compare the two indictments. The Court decided to reject the application because "(it did) not find anything basically new in this superseding indictment that would not have been fully discoverable by a demand for particulars as a request for discovery in the original indictment." (TR-20) Counsel for the defense then outlined the circumstances surrounding the U.S. Attorney's inactions with regard to the defense's request for discovery (TR-24). Mr. Korn's affidavit was also brought up suggesting to the Court the significance the prosecution had placed on the disappearance of Mr. Jones, in light of the original indictment. (TR-20). This importance was contrasted to his insignificance in light of the second (A-4) (and subsequently third and final) indictment. The defense counsel attempted to persuade the Court that the second indictment altered the

prosecution's case as to make all prior preparations for trial inadequate, through no fault of defense counsel. However, all such arguments were rejected by the Court and the trial commenced.

DURING TRIAL

During trial the Court was extremely distressed by the defense counsel's lack of preparation. (TR-179-181) The Court stated to defense counsel that "You are taking a position here that you don't know about this and you don't know about that and you don't know about the other and I am just trying to figure out in terms of your client having a fair trial here just what state of preparation was and the concern given to preparation here..." (TR-181). Defense counsel's response outlined the arguments given the first day of trial and stated that the Court, over the defense's objection of lack of preparation, decided to try the case. (TR-181) Defense counsel also brought up the discussion with the Judge in chambers concerning the lack of communication, the minutes of which were sealed. (TR-186-A-2) At this time the defense moved for a mistrial on the grounds of lack of preparation. This motion was denied. (TR-186) However, the Court allowed the defense one day, Thursday, February 10, 1977, to do any investigations that might be required. (TR-208 and 249) However, the defense began its case sooner than anticipated. The Court did not allow the defense to begin its presentation after the Thursday set aside for investigation, which would have been Friday, February 11, 1977. The defense began at 3:00 Wednesday afternoon. The Court wanted to be assured that, despite the one day the Court would not be in session, that the case would go to the jury on Friday, February 11, 1977. (TR-249)

The defense objected to what seemed to be the desire of the Court to complete the trial as quickly as possible without consideration of the defendant's right to a fair trial. (TR-334). The Court stated that it merely wanted the trial to be over before the jury finished its two week service. (TR-334-335).

The defense rested its case on Friday, February 11, 1977, and the jury came to its verdict after several hours of deliberation. The defendant was sentenced on March 24, 1977.

ARGUMENTS:

1: THE RIGHT TO A SPEEDY TRIAL IS NOT AN ABSOLUTE RIGHT:

In criminal cases the Trial Court is a neutral arbiter for defense as well as for prosecution and must do all it can to keep dockets current. Hodges v. United States; 408 F.2d 543 (CA MO, 1969). In criminal dispositions the Court's power must be broad to insure the speedy disposition of cases and the defendant's constitutional right to a speedy trial. United States v. Lockwood; 382 F. Supp. 1111 (DC NY, 1974). However, the right to a speedy trial is not an absolute right. United States v. Jackson; 508 F.2d 1001 (CA Ill, 1975) In Jackson, a delay of seventeen months between the indictment and the trial was found not to be a denial of the right to a speedy trial. The Jackson Court, citing the United States Supreme Court, has held that the speedy trial right is consistent with delays, and that while it secures rights to the defendants, it does not preclude the rights of the public justice (in the prosecution of criminals). United States v. Ewell, 383 US 116, 120, 86 S.Ct. 773, 776, 15 L.Ed 2d 627 (1966).

The prosecution is entitled to petition the Court pursuant to the Speedy Trial Act 18 USC Sec. 3161 and the Rules of the Time Limits and Procedures for Achieving Prompt Disposition of Criminal Cases, to extend the standard six month period permitted between the time of the trial, if in the best interests of justice, more time for preparation is deemed necessary to insure a fair trial.

The prosecution can request more time to adequately prepare its case and so can the defense in order to assure a fair trial. United States v. Pellegrino, 273 F 2d 570 (USCA 2d Cir 1960) United States v. Maxey, 498 F 2d 474 (USCA 2d Cir 1974).

II: THE SECOND INDICTMENT RADICALLY ALTERED THE DIRECTION OF THE TRIAL:

In the case at bar, the prosecutor, Mr. Korn postponed the commencement of the trial twice, once on January 11, 1977, and again on January 20, 1977 because the prosecution could not apprehend Mr. William Jones who would be a key witness in the prosecution's case. Mr. Korn went so far as to petition the Court by affidavit (A-7) for a suspension of the speedy trial rules so that he would have more time to look for Mr. Jones. The affidavit requested that the time from December 13, 1976 to the present, (approximately five weeks) should be excluded in computing the time within which the trial of the defendant must commence. (A-7). Mr. Korn wanted to postpone the trial until Mr. Jones could be located because Mr. Jones was crucial to the case.

In order to clearly see the importance of Mr. Jones to the prosecution, one should consult the first indictment issued in August, 1976. (A-3) The indictment alleges a conspiracy to steal mail and to defraud the government with William Jones as the co-conspirator in the grocery store on College Avenue in the Bronx. There were two overt acts listed which outlined the conspiracy stated above and not alleging any illegal check cashing activity. The first indictment clearly described one type of offense. However, the prosecution wanted to try Mr. Banks, not only on conspiracy charges, but also on illegal check cashing charges.

An indictment must describe the scheme and other elements of the offense with sufficient particularity to enable the defendant to properly prepare a defense. Leche v. United States, 118 F2d 246 (5th Cir 1941) cert. den. 314 US 617, 62 S.Ct. 73, 86 L.Ed. 496. Hart v. United States, 112 F 2d 128 (5th Cir. 1940).

The prosecution realized that such an incictment did not adequately describe the new charges they wanted to bring up against the defendant. Therefore, in order to so radically alter the charges, they drafted a new indictment.

III. THE DEFENDANT COULD NOT ADEQUATELY PREPARE HIS CASE:

There can be no conspiracy without a co-conspirator and the prosecution needed Mr. Jones in order to present its case. The defense had requested a bill of particulars from the original prosecutor, Mr. Macbeth. The defense was told that when any evidence becomes available, i.e. checks or names of other witnesses besides Mr. Jones, the prosecution would give the defense the information. The prosecutor changed, but no other evidence surfaced and the case appeared to be the one alleged in the original indictment, conspiracy. The defense, therefore, prepared its case around the indictment, which should have given them, the ground plan of the charges against the defendant, and around the evidence acquired from the U.S. Attorney which should have answered any of the major questions concerning the prosecution's case. The defense did everything it was required to do to obtain information about the prosecution's case. The fact that the U.S. Attorney did not adequately respond to the bill of particulars was not the fault of the defense counsel. From the language of the indictment, from the responses of the bill of particulars and from the affidavit of January 20, 1977, (A-7) the defense had no reason to suspect that the prosecution's case at trial would be any different than the one originally alleged. Indeed the totality of the circumstances gave the defense sufficient reason to believe that they were adequately prepared for trial.

In a criminal case the government plainly has the obligation to make available to the defense evidentiary material in its possession which is disclosable under the due process safeguards of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963), or the requirements of Federal Rules of Criminal Procedure or the Jencks Act 18 USC. Sec. 3500. United States v. Miranda, 526 F.2d 1319, 1324, (2d Cir. 1975). If the government fails to carry out the obligation a serious question arises as

to whether such failure calls for the imposition of sanctions against the government. Such sanctions include the granting of a new trial. Federal Rules of Criminal Procedure 33, U.S.C. Sec. 3500 (d), see United States v. Consolidated Laundries Corp. 291 F2d 563, 570-571 (2nd Cir. 1961). Whether or not such sanctions for non disclosure should be imposed depends upon the extent of the government's culpability for failure to make disclosable material available to the defense, on the one hand, weighed against the amount of prejudice to the defense which resulted on the other. United States v. Miranda, 526 F.2d 1319, 1324 (2d Cir. 1975). See also United States v. Pfingst, 490 F2d 262, 277 (2d Cir. 1973) cert. den. 417 US 919, 94 S.Ct. 2625, 41 L.Ed.2d 224 (1974); United States v. Mayersohn, 452 F.2d 269, 272 (2d Cir. 1975). If the District Court finds that the failure to disclose was deliberate or the result of gross negligence on the part of the government it should order a new trial. United States v. Morell, 524 F. 2d 550 (2d Cir. 1975).

The government attorney did not disclose the names of any new witnesses to the defense nor did it submit copies of the checks the defendant was alleged to have signed. Disclosure of the names of witnesses is required by United States v. Cannone, 528, F.2d 296 (2d Cir. 1975). Disclosure of evidence is required by Federal Rules of Criminal Procedure 33. The prosecution knew several weeks before trial, when it decided to go to trial without Mr. Jones, that they were going to supercede the original indictment. The prosecution also knew that they had amassed evidence which would radically change the scope of the trial. However, they never gave defense counsel any of the required evidence, as was requested by the defense's bill of particulars, and required by the case law and statutes cited above. Evidence of the drastic changes are readily apparent in comparison of the second indictment to the first. The fact that a second indictment was necessary must give certain insights into the changes.

However, more than a second indictment is required to be of legal significance to the defendant. There must be a showing of prejudice which comes about through a showing of surprise and/or lack of preparation. People v. Marrs, 125 Mich. 376, 84 N.W. 284 (1900); United States v. Pellegrino, 273 F.2d. 570 (USCA 2d Cir. 1960); People v. Latimer, 35 Ill. 2d 178, 220 NE 2d 314 (1966).

Therefore, if the defendant can show surprise or lack of preparation due to the prosecution's actions, which are prejudicial to the defendant, then the defendant is entitled to a new trial.

The second indictment (A-4) lists four overt acts which were not charged in the first indictment. The overt acts charged the illegal cashing of three checks from December, 1973 through April, 1975. The second indictment was read to defense counsel on the telephone on February 3, 1977 and not given to defense counsel until the first day of trial, February , 1977. The prosecution knew that they were going to supercede the original indictment well before February 3, 1977. The prosecution also knew that other witnesses would be called to testify at the trial since Mr. Jones was unavailable. However, the prosecution chose to keep the defendant in the dark about all of these matters.

The prosecution knew that the defense was going to request an adjournment, but they did not tell defense counsel, although requested to do so by the Court, that all motions for adjournment should have been made by February 4, 1977. Therefore defendant, due to the severally prejudicial inactions of the U.S. Attorney went to trial on February 7, 1977 entirely unprepared. The Trial Court refused to grant the adjournment. The case had already been postponed twice, upon the request of the government attorney because of his inability to prepare the prosecution. However, the same courtesies were not extended to the defendant

who is the only person in this matter who has a stake in the outcome. Any defendant has a constitutional right to effective assistance of counsel. Joseph v. United States, 321 F.2d 710, 714, (CA 9th Cir. 1963), cert. denied 84 S.Ct. 497, 375 US 977, 11 L.Ed. 2d 422. Thomas Banks was not permitted effective assistance of counsel due to lack of preparations before trial. The lack of preparations came about not through any underhanded actions of the defendant, as were described in Maxey (Supra 498 F.2d 474, (USCA 2d Cir. 1974)) decision but through the devices of the prosecuting attorney. The sanctions described in Consolidated Laundries (supra, 291 F.2d. 563 (2d Cir. 1961)) should be imposed in the case at bar. However, whether or not the Appellate Court grants a new trial because of the inactions of the prosecution, they should permit a new trial because of the abuse of discretion of the Trial Court.

IV: THE TRIAL COURT ABUSED ITS DISCRETION IN NOT GRANTING AN
ADJOURNMENT:

The Trial Court had the discretion to permit or disapprove a request for an adjournment. Isaacs v. United States, 159 U.S. 487, 16 S.Ct. 51, 40 L.Ed. 229 (1895); United States v. Maxey, 498 F.2d 474 (USCA 2d Cir. 1974). One of the grounds upon which an adjournment may be granted is surprise and lack of preparation. Whether the time allowed counsel for preparation of trial is sufficient will depend upon the nature of the charge, the issues presented, counsel's familiarity with the applicable law and the availability of material witnesses. Roxy v. United States, 197 F. 2d 268,271 (8th Cir. 1952). The decision of the Trial Court is subject to review when abuse of discretion has been shown. Isaacs v. United States, 159 U.S. 487, 489, 16 S.Ct. 51, 52, 40 L.Ed. 229 (1895); United States v. Hoffer, 423 F.Supp.811 (DCNY1976); Federal Rules of Criminal Procedure, Rule 33. The decision of the trial judge permitted the prosecution a windfall gain, an unfair tactical advantage over the defendant which would not allow for a fair trial. Such an advantage should weigh heavily against the government. Barker v. Wingo, 407 US 531, 92 S.Ct. 2182, 33 L.Ed. 2d 101 (1972). These issues go to the heart of the fairness of the trial. United States v. Sanchez, 459 F2d 100, (CANY 1972), cert. denied 93 S.Ct. 156, 409 U.S. 864, 34 L.Ed. 2d 112. The reasonableness of the decision not to grant the adjournment is an important factor which the Court must weigh in reviewing the trial judge's decision. United States v. Rosenthal, 470 F. 2d 837 (CANY 1972) cert. denied 93 S.Ct. 2298 412 U.S. 909, 36 L.Ed. 2d 975. Other factors to be considered are all the circumstances surrounding the Trial Court's decision which would indicate the necessity for an adjournment because the policy concerning the trial judge's decision is not inflexible. United States v. Inman, 483 F.2d 738, (CAVA. 1973) cert. denied 94 S.Ct. 2394, 416 US 988, 40 L.Ed. 2d 766. Indeed the trial

judge commented unfavorably about defense counsel's lack of preparation at trial (TR-171) The trial judge's actions in not allowing the adjournment seemed to stem from his desire to get the case over with as quickly as possible. While the prompt disposition of criminal cases is to be commended and encouraged, in reaching a result the defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare a defense. Powell v. Alabama, 287 US 45, 59, 53 S.Ct. 55, 60 77 L.Ed.153 (1932); Wallack v. Hudsoeth, 128 F.2d 343 (CCA 1d Cir 1942).

Thomas Banks did not have the right to advise with counsel and prepare a defense, in the three days between the time of the indictment and the time of trial. The decision of the trial judge which disallowed the adjournment and presented the defendant from preparing his defense should be the grounds upon which a new trial is granted.

CONCLUSION

Due to the desire of the Trial Court to commence and complete the case at bar as expeditiously as it could, the defendant, Thomas Banks, was denied a fair trial. The Trial Court abused its discretion in refusing to grant an adjournment and the Appellate Court should in the interests of justice, grant the defendant a new trial.

WHEREFORE it is respectfully requested that the defendant be granted a new trial.

UNITED STATES OF AMERICA

-v-

THOMAS BANKS,

Defendant.

INDICTMENT

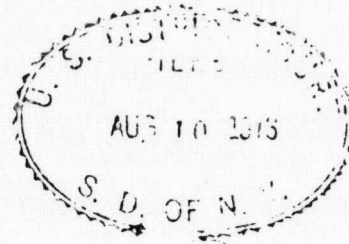
76 Cr.

COUNT ONE

The Grand Jury charges:

1. From in or about December, 1973 up to and including the day of the filing of this indictment, in the Southern District of New York, THOMAS BANKS, the defendant, William Jones, named herein as a co-conspirator but not as a defendant, and others to the Grand Jury known and unknown, unlawfully, wilfully and knowingly did combine, conspire, confederate, and agree together and with each other to defraud the United States and to commit offenses against the United States, to wit, to violate Section 1708, Title 18, United States Code.

2. It was part of said conspiracy that the said defendant and co-conspirators unlawfully, wilfully, and knowingly would and did steal, take and abstract and by fraud and deception obtain from and out of the mail, post office and station thereof, letter box, mail receptacle, and mail route and other authorized depository of mail matter and from a mail and letter carrier, letters and mail and would and did have in their possession letters and mail and things contained therein, which had been so stolen, taken, embezzled, and abstracted, knowing the same to have been stolen, taken, embezzled and abstracted.



WILKINSON FILM

AUG 10 1976

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof the following overt acts, among others, were committed in the Southern District of New York:

1. In or about December, 1973 co-conspirator William Jones met with Morris J. Smith.
2. In or about March, 1976, co-conspirator William Jones met defendant THOMAS BANKS in a grocery store on College Avenue, Bronx, New York.

(Title 18, United States Code, Section 371.)

Eugene W. Schreiner
FOREMAN

Robert B. Fisher Jr.
ROBERT B. FISHER, JR.
United States Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
UNITED STATES OF AMERICA, :

-v- :

THOMAS BANKS, :

Defendant. :

INDICTMENT

S 77 Cr.

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COUNT ONE

The Grand Jury charges:

1. From in or about May, 1973 up to and including the day of the filing of this indictment, in the Southern District of New York, THOMAS BANKS, the defendant, William Jones, named herein as a co-conspirator but not as a defendant, and others to the Grand Jury known and unknown, unlawfully, wilfully and knowingly did combine, conspire, confederate, and agree together and with each other ~~to defraud the United States and~~ to commit offense against the United States, to wit, to violate Sections 1708 and 1709, Title 18, United States Code.

2. It was part of said conspiracy that the defendant and his co-conspirators unlawfully, wilfully, and knowingly would and did steal, take and abstract and by fraud and deception obtain from and out of the mail, post office and station thereof, letter box, mail receptacle, and mail route and other authorized depository of mail matter and from a mail and letter carrier, letters and mail and would and did have in their possession letters and mail and things contained therein, which had been so stolen, taken, embezzled and abstracted, knowing the same to have been stolen, taken, embezzled and abstracted.

3. It was further a part of said conspiracy that the defendant, being a Postal Service employee, and his co-conspirators unlawfully, wilfully and knowingly, would and did embezzle letters and mail and any article and thing contained therein which came into his possession and was intended to be conveyed by mail.

OVERT ACTS

In pursuance of the said conspiracy and to affect the objects thereof the following overt acts, among others, were committed in the Southern District of New York:

1. On or about December 17, 1973, the defendant, THOMAS BANKS, presented a check made payable to Minnie Oliver, 1405 College Avenue, Bronx, New York, in the amount of \$80.50, and issued by The City of New York, Department of Social Services, to Virgilio Aponte, at a grocery store located at 1294 College Avenue, Bronx, New York.

2. On or about February 4, 1975, the defendant, THOMAS BANKS, presented a check made payable to Frederick Burnett, 1420 College Avenue, Bronx, New York 10456, in the amount of \$175, dated February 4, 1975, and issued by The City of New York, Department of Social Services, to Pedro Perez at a grocery store located at 1294 College Avenue, Bronx, New York.

3. On or about April 23, 1975, the defendant, THOMAS BANKS, handed a check made payable to Carmen Febres, 2343 Morris Avenue, Bronx, New York 10468, in the amount of \$24, dated April 23, 1975, and issued by State of New York, Department of Taxation and Finance Income Tax Special Refund Account, to Nelson Perez at a grocery store located at 1294 College Avenue, Bronx, New York.

HHK:ds
2-1445

4. In or about March 1976, co-conspirator William Jones met the defendant, THOMAS BANKS, at a grocery store located at 1294 College Avenue, Bronx, New York.

(Title 18, United States Code, Section 371.)

COUNTS TWO AND THREE

The Grand Jury further charges:

On or about the dates hereinafter set forth, in the Southern District of New York and elsewhere, THOMAS BANKS, the defendant, being a Postal Service employee did unlawfully, wilfully and knowingly embezzle the following mail matter which had come into his possession and were intended to be conveyed by mail:

<u>COUNT</u>	<u>DATE</u>	<u>ADDRESSEE</u>	<u>CONTENTS OF MAIL MATTER</u>
2	December 17, 1973	Minnie Oliver 1405 College Ave. Bronx, New York	A City of New York check in the approximate amount of \$80.50
3	February 4, 1975	Frederick Burnett 1420 College Ave. Bronx, New York	A City of New York check in the approximate amount of \$175.

(Title 18, United States Code, Section 1709.)

FOREMAN

ROBERT E. FISKE, JR.
United States Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x

UNITED STATES OF AMERICA :

- v - :

INDICTMENT

THOMAS BANKS, :

S 77 Cr.

Defendant. :

----- x

COUNT ONE

The Grand Jury charges:

1. From in or about May, 1973 up to and including the day of the filing of this indictment, in the Southern District of New York, THOMAS BANKS, the defendant, William Jones, named herein as a co-conspirator but not as a defendant, and others to the Grand Jury known and unknown, unlawfully, wilfully and knowingly did combine, conspire, confederate, and agree together and with each other to defraud the United States and to commit offense against the United States, to wit, to violate Sections 1708, and 1709, Title 18, United States Code.

2. It was part of said conspiracy that the defendant and his co-conspirators unlawfully, wilfully, and knowingly would and did steal, take and abstract and by fraud and deception obtain from and out of the mail, post office and station thereof, letter box, mail receptacle, and mail route and other authorized depository of mail matter and from a mail and letter carrier, letters and mail and would and did have in their possession letters and mail and things contained therein, which had been so stolen, taken, embezzled and abstracted, knowing the same to have been stolen, taken, embezzled and abstracted.

3. It was further a part of said conspiracy that the defendant, being a Postal Service employee, and his co-conspirators unlawfully, wilfully and knowingly, would and did embezzle letters and mail and any article and thing contained therein which came into his possession and was intended to be conveyed by mail.

OVERT ACTS

In pursuance of the said conspiracy and to affect the objects thereof the following overt acts, among others, were committed in the Southern District of New York:

1. On or about May 1, 1973, the defendant, THOMAS BANKS, presented a check made payable to Norman Williams, 1321 College Avenue, Bronx, New York 10456, in the amount of \$47, dated May 1, 1973, and issued by the City of New York, Department of Social Services, to Virgilio Aponte, at a grocery store located at 1294 College Avenue, Bronx, New York.

2. On or about December 17, 1973, the defendant, THOMAS BANKS, presented a check made payable to Minnie Oliver, 1405 College Avenue, Bronx, New York, in the amount of \$80.50, and issued by The City of New York, Department of Social Services, to Virgilio Aponte, at a grocery store located at 1294 College Avenue, Bronx, New York.

3. On or about February 4, 1975, the defendant, THOMAS BANKS, presented a check made payable to Frederick Burnett, 1420 College Avenue, Bronx, New York 10456, in the amount of \$175, dated February 4, 1975, and issued by The City of New York, Department of Social Services, to Pedro Perez at a grocery store located at 1294 College Avenue, Bronx, New York.

4. On or about April 23, 1975, the defendant, THOMAS BANKS, handed a check made payable to Carmen Febres, 2343 Morris Avenue, Bronx, New York 10468, in the amount of \$24, dated April 23, 1975, and issued by State of New York, Department of Taxation and Finance Income Tax Special Refund Account, to Nelson Perez at a grocery store located at 1294 College Avenue, Bronx, New York.

5. In or about March 1976, co-conspirator William Jones met the defendant, THOMAS BANKS, at a grocery store located at 1294 College Avenue, Bronx, New York.

(Title 18, United States Code, Section 371.)

COUNTS TWO THROUGH FIVE

The Grand Jury further charges:

On or about the dates hereinafter set forth, in the Southern District of New York and elsewhere, THOMAS BANKS, the defendant, being a Postal Service employee did unlawfully, wilfully and knowingly embezzle the following mail matter which had come into his possession and were intended to be conveyed by mail:

<u>COUNT</u>	<u>DATE</u>	<u>ADDRESSEE</u>	<u>CONTENTS OF MAIL MATTER</u>
2	May 1, 1973	Norman Williams 1321 College Ave. Bronx, New York	A City of New York check in the approximate amount of \$47.
3	December 17, 1973	Minnie Oliver 1405 College Ave. Bronx, New York	A City of New York check in the approximate amount of \$80.00.
4	February 4, 1975	Frederick Burnett 1420 College Ave. Bronx, New York	A City of New York check in the approximate amount of \$175.

HHK:ma

<u>COUNT</u>	<u>DATE</u>	<u>ADDRESSEE</u>	<u>CONTENT OF MAIL MATTER</u>
5	April 23, 1975	Carmen Febres 2343 Morris Ave. Bronx, New York	A State of New York check in the approximate amount of \$24

(Title 18, United States Code, Section 1709.)

Foreman

ROBERT B. FISKE, JR.
United States Attorney



ADDRESS REPLY TO
"UNITED STATES ATTORNEY"
AND REFER TO
INITIALS AND NUMBER

United States Department of Justice

UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF NEW YORK
ONE ST. ANDREW'S PLAZA
NEW YORK, NEW YORK 10007

HLK:jj

616-887-2711

January 13, 1977

Herbert Brown, Esq.
53 Seawave Road
East Rockaway, New York

Re: United States v. Thomas Banks
76 Cr. 736

Dear Mr. Brown:

The Government will make an application at 2:15 p.m.
on January 20, 1977, before the Court based on the enclosed
affidavit.

Very truly yours,

ROBERT B. FISKE, JR.
United States Attorney

By:

Henry H. Korn

HENRY H. KORN
Assistant United States Attorney
Telephone: (212) 791-1991

cc: Honorable Richard Owen
United States District Court
Southern District of New York
Foley Square, Room 2903
New York, New York



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA :

- v - :

THOMAS BANKS, :

Defendant. :

AFFIDAVIT
76 Cr. 736 (R.O.)

-----X
STATE OF NEW YORK)
COUNTY OF NEW YORK :
SOUTHERN DISTRICT OF NEW YORK)

HENRY H. KORN, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney for the Southern District of New York in the office of Robert B. Fiske, Jr.

2. I have charge of the prosecution of this case and make this affidavit for an order pursuant to the Speedy Trial Act, 18 U.S.C. §3161 (h)(3)(A) and (B), and Rule 10(a) of the Time Limits and Procedures for Achieving Prompt Disposition of Criminal Cases, excluding the period, from December 13, 1976 until the date of apprehension of William Jones, in computing the time within which the trial of the defendant must commence.

3. The Indictment was filed on August 10, 1976. It charges that from in or about December 1973 to the filing of the Indictment, the defendant conspired with William Jones, an unindicted co-conspirator, to commit certain offenses against the United States; namely, to

steal from the mail and to possess stolen mail knowing it to have been stolen. At all times charged in the Indictment, the defendant was employed by the United States Postal Service as a letter carrier in the Bronx, New York.

4. Trial was tentatively set for the latter part of December 1976, after this Court was advised by the Government that William Jones had violated his probation and could not be located and apprehended by federal and local authorities. Trial was then scheduled for January 3, 1977; however, at the Government's request, Jones' still being unavailable, the date was adjourned until January 11, 1977.

5. On January 5, 1977, the Government advised the Court that William Jones still could not be located and requested a further adjournment of the trial date.

6. The Court scheduled trial for February 7, 1977, indicated it would not entertain further adjournments caused by the unavailability of Jones but indicated that it would entertain an application by the Government, made returnable on January 20, 1977, to have the time during which the Government has endeavored to apprehend Jones excluded in computing the time within which the trial of the defendant must commence.

The Government has diligently endeavored to apprehend Jones, without success, and, therefore, the time from December 13, 1976 to the date Jones is apprehended is excludable under the Speedy Trial Act.

7. On or about December 10, 1976, I notified postal inspectors assigned to this case that a trial date had been set by the Court for the latter part of December 1976, and they would have to locate William Jones so that the Government could prepare for trial. Beginning on December 13, 1976 postal inspectors have tried, without success, to locate and apprehend Jones.

8. Postal inspectors have conducted surveillance on a daily basis of the neighborhood in which Jones, his relatives and close friends live. As of the date of this affidavit, the search still continues and will continue until Jones is apprehended.

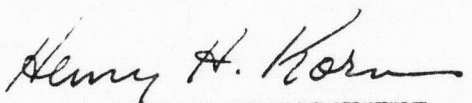
9. Since December 13, three inspectors and two trainee inspectors have at one time or another staked out the area where Jones lives and is known to frequent regularly. This includes 165th -166th Streets and Morris Avenue, in the Bronx, - - the location of a bar and gambling club where Jones is known to have frequented -- 156th Street in the Bronx - - a housing project where Jones' wife lives - - 143rd Street and 8th Avenue in the Bronx - - where Jones' girlfriend lives.

10. At these locations, the inspectors have interviewed in the past few weeks, Jones' known close friends and associates who have all said that they have seen Jones in the neighborhood and know him still to be in the neighborhood. In fact, on January 6, 1977, postal inspectors interviewed two associates of Jones who said Jones was seen over the New Year's weekend in the bar and gambling club. The inspectors believe that they are close to apprehending Jones.

11. Finally, I have been informed by postal inspectors that other federal and local law enforcement officials are actively searching for Jones. The warrant squad of the Federal Bureau of Investigation has been actively looking for Jones for having violated his probation. The postal inspectors gave the New York City Police and Housing Police a copy of Jones' picture and the warrant for his arrest and they are also looking for Jones in the neighborhood.

12. For the foregoing reasons, the Government is convinced that William Jones is attempting to avoid apprehension.

13. Accordingly, the Government respectfully requests the Court to order that the period from December 13, 1976, when law enforcement authorities, at the Government's request, commenced daily surveillance to apprehend Jones, to the date Jones is located and apprehended shall be excluded in computing the time within which the trial of the defendants must commence.


HENRY H. KORN

Sworn to before me this
day of January, 1977

HHK:im

January 21, 1977

Honorable Richard Owen
United States District Judge
United States District Court
Southern District of New York
Room 2903
Foley Square
New York, New York 10007

Re: United States v. Banks, 76 Cr. 736

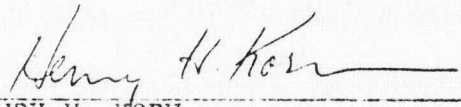
Dear Judge Owen:

Pursuant to the Court's order of January 20, 1977, the Government encloses copies of the following statements of William Jones to law enforcement officials: (a) statement of William Jones to postal inspectors dated June 16, 1975 and (b) statement of William Jones to an Assistant United States Attorney before arraignment on June 17, 1975.

The Government submits these statements demonstrate that Jones is an essential witness as that term is used under 18 U.S.C. §3161(h)(3)(A) and (B).

Respectfully yours,

ROBERT B. FISKE, JR.;
United States Attorney

By: 
HENRY H. KORN
Assistant United States Attorney

Honorable Richard Owen -2-

January 21, 1977

cc: Herbert Brown, Esq.
Attorney for Defendant
53 Seawave Road
East Rockaway, New York

P.S. I also enclose a copy of Jones' arrest record following up on your request yesterday.

HHK:hbc

January 31, 1977

Honorable Richard Owen
United States District Judge
United States District Court
Southern District of New York
Room 2903
New York, New York 10007

Re: United States v. Thomas Banks

Dear Judge Owen:

By this letter, the Government respectfully withdraws its motion of January 20, 1977 for an order of the Court to exclude from the Speedy Trial Act the period of time during which the Government has diligently searched for William Jones.

The Government has been unable to locate William Jones, but is prepared to go to trial on February 7, 1977 without him.

Respectfully submitted,
ROBERT B. FISKE, Jr.
United States Attorney

By: Henry H. Korn

HENRY H. KORN

Assistant United States Attorney

cc: Herbert Brown, Esq.
53 Seawave Road
East Rockaway, New York



ADDRESS REPLY TO
"UNITED STATES ATTORNEY"
AND REFER TO
INITIALS AND NUMBER

United States Department of Justice

UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF NEW YORK
ONE ST. ANDREW'S PLAZA
NEW YORK, NEW YORK 10007

HHK:im

February 7, 1977

Herbert Brown, Esq.
53 Seawave Road
East Rockaway, New York

Re: United States v. Thomas Banks,
\$76 Cr. 736 (R.O.)

Dear Mr. Brown:

This letter confirms the understandings we reached on Thursday afternoon, February 3, 1977.

At that time, I read to you the substance of the superseding indictment filed on February 3, 1977. I specifically gave you the descriptions of the four checks which the Government charges in the superseding indictment that Thomas Banks embezzled.

I also informed you on that day that the 3500 material and certain Brady material--including the Crime Lab reports testing for handwriting and fingerprints of Mr. Banks on certain checks--would be available for you on Friday, February 4. You indicated you would not be able to come to my office on Friday so I agreed to have this material available to you on Sunday before noon.

On Friday, February 4, I called you again and told you who the unindicted co-conspirators were, although you had not asked for this information. I also told you who were the witnesses which the Government expected to call. By telephone we also agreed to stipulate that the four checks in the Indictment were duly mailed.



HHK:im

Herbert Brown, Esq.

-2-

February 7, 1977

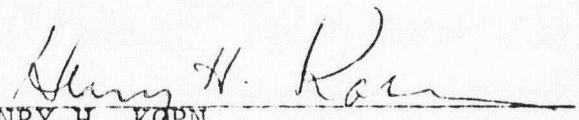
On Sunday, February 6, I arrived in my office at 10:30, as the copy of the attached manifest indicates, and stayed there until 2:00 P.M. Unfortunately, I was away from my desk at 10:45 A.M. when you arrived. I was in the office talking to another Assistant. I read your note in which you stated you were here at 10:45 A.M. and immediately called your wife to ask her if she could contact you before you returned home to East Rockaway. That call was made at approximately 11:05 A.M.

By this letter, I am handing you copies of the four checks, the Brady and 3500 material in this case, as well as copies of certain photographs taken of the grocery store at 1294 College Avenue. I have enclosed a list which sets forth exactly what the Government has turned over to you.

I am also handing you copies of certain documents submitted by Mr. Banks to the Veterans Administration in March 1974 wherein Mr. Banks arranged to obtain a mortgage guaranty to purchase his home at 2141 Story Avenue, the Bronx. The Government may seek to prove as a similar act the fact that your client states he was employed at the grocery store at 1294 College Avenue, earning approximately \$100 per week, when he in fact did not work there. The Government may seek to prove Mr. Banks caused Virgilio Aponte, the owner of the store, to forge the signature of Jose Rosado Santiago on a Verification of Employment form submitted to the V.A. in which it is stated Mr. Banks was an employee.

Very truly yours,

ROBERT B. FISKE, JR.,
United States Attorney

By: 
HENRY H. KORN
Assistant United States Attorney

Enclosures

Herbert Brown, Esq.

-3-

February 7, 1977

cc: Honorable Richard Owen
United States District Judge
Southern District of New York
United States Courthouse
Room 2903
New York, New York 10007

